Supreme Court, U.S.
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No. 88-1850

IN THE

Supreme Court of the United States

October 1988 Term

SEVENTY-TWO THOUSAND NINE HUNDRED AND FORTY DOLLARS IN UNITED STATES CURRENCY
TERRY TOWNSEND, *Petitioners*

VS.

UNITED STATES, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI FROM DECISIONS OF THE SIXTH CIRCUIT COURT OF APPEALS

APPELLANT'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether *in personam* jurisdiction co-existed in an *in rem* proceeding where the Defendant filed a motion pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure.

II. Whether *in personam* jurisdiction was created by the instigation of the *in rem* proceeding of forfeiture by the Government.

III. Whether the Court of Appeals must consider if the res had been released accidentally, fraudulently or improperly before dismissal for lack of *in rem* jurisdiction.

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OPINIONS BELOW

The opinion and order of the United States District Court for the Western District of Tennessee, Western Division is unreported and contained in the Transcript of the Record. (R 22) The opinion of the United States Court of Appeals for the Sixth Circuit is unreported, and is contained in the Transcript of the Record (R October 25, 1988).

JURISDICTION

Appeal was taken to the United States Court of Appeals for the Sixth Circuit from the Decision of the United States District Court, Western District of Tennessee, Western Division, Honorable Julia Smith Gibbons presiding on a decision entered on or about May 9, 1988.

On or about October 5, 1988, Motion to Dismiss for Lack of Jurisdiction was filed. Motion was served upon Petitioner October 13, 1988. However, the Court of Appeals ruled upon the Motion to Dismiss on October 5, 1988.

Petitioner petitioned for a rehearing on the Dismissal which was denied on February 10, 1989.

Jurisdiction to review the dismissal of this matter on Petition for Writ of Certiorari lies with this Court

pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The texts of the following statutes relevant to the determination of the present case are set forth in the appendices: *Forfeiture*, 21 U.S.C. Section 881(a)(b), *1970: Search and Seizure*, Rule 41(e) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

On April 13, 1986, Terry Townsend, the petitioner herein, arrived at the Memphis International Airport somewhere between the hours of 8:00 a.m. and 8:45 a.m. (TR 73).

Mr. Townsend, a black liquor store owner, had purchased a ticket on Republic Airlines destination Miami/Tampa, Florida (TR 73). It is undisputed that his intention was to take a domestic flight to another city within the continental United States, namely Miami, Florida (TR 17). The purpose of Mr. Townsend's trip was to attempt to purchase some Florida real estate from an individual named Mrs. Hernandez. It was Mr. Townsend's intention to attempt to purchase this property substantially less than the asking price by paying cash (TR 81). To this end, Mr. Townsend carried with him Seventy-two Thousand Nine Hundred Forty and no/100 Dollars ($72,940) in United States currency

stored in one of his bags (TR 81).

When Mr. Townsend arrived at the Memphis Airport, he checked in through the terminal in the normal fashion (TR 42-43). Mr. Townsend proceeded through the security checkpoint with one carry on bag on his way to the concourse area (TR 42). The sum of Seventy-two Thousand Nine Hundred Forty and no/100 Dollars ($72,940) in United States currency was viewed by airport security when Mr. Townsend's carry on bag was x-rayed (TR 43).

Three airport security police approached and detained Mr. Townsend (TR 43-44). They immediately took possession of his airline ticket and luggage (TR 59). Mr. Townsend was told he was not under arrest (TR 74). Mr. Townsend, on crutches and flanked by two armed officers, was escorted down the concourse to an investigation facility (TR 45 and 75).

And in the interrogation room, Agent Richard Holmes and Anthony Belovich of the Drug Enforcement Administration arrived and questioned Mr. Townsend alone in the small room for roughly 45 minutes (TR 10-12). Mr. Townsend was ultimately released without having any criminal charges filed against him, but the money was confiscated by the government (TR 35).

Mr. Townsend filed a motion under Rule 41(e) of the Federal Rules of Criminal Procedure requesting the

return of the money (R 10). The government instituted a civil forfeiture proceeding pursuant to the provisions of 21 U.S.C. Section 881. The forfeiture proceeding was tried in the United States District Court, Western District of Tennessee, Western Division in Memphis. During the pendency of the trial, petitioner moved the Court that the res be placed in an interest bearing account. The Court failed to act upon petitioner's motion prior to rendering its decision. A timely notice of appeal was filed May 24, 1988 to the Court of Appeals for the Sixth Circuit. Petitioner did not file for stay of execution. The res was dispersed. Counsel for the respondent, the United States Attorney for the Western District of Tennessee, filed a motion to dismiss the appeal for lack of *in rem* jurisdiction. The motion was not answered by petitioner. Said motion was not served upon petitioner until it was too late for petitioner to respond with even a motion for extension of time. The United States Court of Appeals for the Sixth Circuit dismissed cause of action for lack of *in rem* jurisdiction.

SUMMARY OF THE ARGUMENT

Dismissal of Petitioner Townsend's appeal was predicated upon failure to file a motion for a stay of execution of judgment in the District Court. Thus, the res was dispersed to the Treasury of the United States and not present before the Court of Appeals. The *in rem* jurisdiction had been destroyed.

There had been a clear indication of Petitioner, by means of a motion filed February 23, 1988, to move the District Court to place the res in an interest bearing account to preserve the *in rem* jurisdiction. Had this been done, Petitioner would have received notice of the dispersion. The Court failed to act upon Petitioner's motion prior to rendering its decision.

It was, and is, the contention of Petitioner that both parties have submitted to *in personam* and *in rem* jurisdiction; therefore, dispersion of the res did not destroy the jurisdiction of the Sixth Circuit.

The filing of Petitioner's motion pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure clearly speaks *in personam.* The issue created by the Rule 41(e) motion was before the Court as well as the issue of civil forfeiture.

The interface between *in rem* and *in personam* was also created by the instigation of the forfeiture action by the government. There is a split of authority throughout the various circuits, with regard to this area. The Fifth and Eleventh Circuits being the poles.

The question of *in rem* jurisdiction is based on the old admiralty rule that a ship is a person. This allowed actions to be brought against the res when the owner could not be reached. The Eleventh Circuit adheres to

the strict interpretations of this rule. The Fifth Circuit recognizes that this rule is a legal fiction which exists solely to effectuate the adjudication of disputes. When this rule is invoked for an opposite purpose the Fifth Circuit looks beyond this legal fiction, requiring the presence of the res within the district for jurisdiction, to find *in personam* jurisdiction.

The Petitioner also contends that the Court of Appeals for the Sixth Circuit failed to consider whether the res had been released accidentally, fraudulently or improperly. The district court chose to act as surrogate trustee by holding the res rather than depositing it with a bank. Therefore, a fiduciary duty was created to inform the appellant of the impending release. Had the res been deposited in an interest bearing account pursuant to Petitioner's motion, notice would have been given by the bank. Thus, the funds were released improperly.

ARGUMENT

I

DISMISSAL OF THE APPEAL WAS IMPROPER BECAUSE THE COURT OF APPEALS RETAINED *IN PERSONAM* JURISDICTION OVER THE LITIGANTS.

Civil Forfeiture of the petitioner's property is considered an *in rem* proceeding brought pursuant to 21

U.S.C. Section 881. *See* Appendix H. Removal of the res from a Court's territorial jurisdiction destroys that court's *in rem* jurisdiction. Where an appellant fails to file a stay of judgment or supersedeas bond and the res is removed from the court's territorial jurisdiction, the appellate court does not have *in rem* jurisdiction. *U.S. v. One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir. 1988); *Taylor v. Tracor Marine, Inc.*, 683 F.2d 1361 (11th Cir. 1982), *cert. denied*, 460 U.S. 1012, 103 S.Ct. 1252, 75 L.Ed.2d 481 (1983). Generally, the only exception to this rule is if the res is released accidentally, fraudulently or improperly. *Parks v. B. F. Leaman and Sons, Inc.*, 279 F.2d 529 (5th Cir. 1960). Although removal of res, due to the failure to file a stay of judgment, destroyed *in rem* jurisdiction, the Court of Appeals failed to look beyond the *in rem* jurisdiction to determine if the litigants had subjected themselves to *in personam* jurisdiction.

A. Petitioner's Motion under Rule 41(e) of the Federal Rules of Criminal Procedure created *in personam* jurisdiction.

In rem and *in personam* jurisdiction may co-exist within a single cause of action. *United States v. Wingfield*, 822 F.2d 1466 (10th Cir. 1987). In the instant case both apply. The petitioner filed a motion pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, thereupon, the Government instituted a civil forfeiture proceeding pursuant to 21 U.S.C. Section 881. Both issues were before the district court. Rule 41(e) of the

Federal Rules of Criminal Procedure clearly acts *in personam*. *See* Appendix I. It is an invocation of the court's inherent powers to supervise its officers. *Hunsucher v. Finney*, 497 F.2d 29 (5th Cir. 1974), *cert. denied*, 420 U.S. 927, 95 S.Ct. 1124, 43 L.Ed.2d 397 (1975); *Fifth Avenue Peace Parade Committee v. Hoover*, 327 F.Supp. 238 (D.N.Y. 1971).

When the original action was brought *in rem* and *in personam*, the court retains jurisdiction even after the res is removed from the district. *Inland Credit Corp. v. M/T Bow Egret*, 552 F.2d 1148 (5th Cir. 1977). The Court of Appeals for the Sixth Circuit should not have dismissed for lack of jurisdiction after the distribution of the res to the government. The Court of Appeals could use the *in personam* jurisdiction created by the Rule 41(e) motion without having to rely upon the res for *in rem* jurisdiction.

B. By bringing the forfeiture action, the Government submitted to *in personam* jurisdiction.

The plaintiff United States, after initially invoking the jurisdiction of the federal courts by initiating the civil forfeiture and then removing the res from the court's jurisdiction, now claims lack of subject matter jurisdiction in order to defeat the petitioner's right of appeal. In the usual *in rem* case, the issue becomes whether the plaintiff may establish *in personam*

jurisdiction over the owner of the res once the res has been removed from the court's jurisdiction. *United States v. One Lear Jet Aircraft*, supra. The issue in the present case is whether the defendant/petitioner may establish *in personam* jurisdiction over the instigator of the *in rem* action, the plaintiff.

Although there is a split of authority throughout the various circuits, the decisions of the Fifth and Eleventh Circuits in this area appear to be the precedents looked to by the remaining circuits. The First and Tenth Circuits have followed the Fifth Circuit's lead in looking beyond the legal fiction of requiring the presence of the res within the district for jurisdiction when it's being used to escape the defendant's right of appeal. *Trans-Asiatic Ltd., S.A. v. Apex Oil Co.*, 804 F.2d 773 (1st Cir. 1986); *United States v. Wingfield*, 822 F.2d 1466 (10th Cir. 1987). The Ninth Circuit has aligned themselves with the Eleventh Circuit in giving effect to this legal fiction irrespective of the purpose. *United States v. $57,480.05 in U.S. Currency*, 722 F.2d 1457 (9th Cir. 1984).

The Fifth Circuit considers intervention by the government in a plaintiff's *in rem* action as a basis for *in personam* jurisdiction. *Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978). The Eleventh Circuit distinguished this finding of *in personam* jurisdiction when the government intervened for the purposes of filing a

counterclaim in the recent case of *One Lear Jet.* The Eleventh Circuit noted that the parties in *Treasure Salvors* consented to the district court's exercise of *in rem* jurisdiction, but the losing party subsequently challenged that court's jurisdiction on appeal. The Eleventh Circuit's distinction centered around the government not consenting to the court's *in personam* jurisdiction. The government brought the action *in rem. One Lear Jet* is factually on point with the Petitioner's situation. However, the dissenting opinion of Judge Vance points out the jurisdictional significance inherent in instigating an action:

> "Having submitted itself to the jurisdiction of the court, the government should not be allowed to escape through its subsequent jurisdictional exceptions to the claimant's appeal." 836 F.2d at 1579.

Judge Vance also notes, the government has argued successfully in other cases that it has personal jurisdiction over the owner of the res even after the res has disappeared. *Id.*

The Fifth Circuit case *Inland Credit Corp.* rejects the distinction presented by the majority in *One Lear Jet.* The court rejected a similar plaintiff's argument, noting that it amounted to the proposition that there can be no

appeal from a distribution order once the proceeds have been disbursed. 552 F.2d at 1151.

The court explained that it had *in personam* jurisdiction over the plaintiff because the plaintiff "by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court . . ." *Id.* at 1152 *(quoting Adam v. Salinger*, 303 U.S. 59, 67-68 [1938]). The United States in this case similarly has submitted itself to the jurisdiction of the court by demanding justice from the defendant in this forfeiture action.

In a more recent case, decided under the seizure and forfeiture component of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. Section 301 *et seq.*, the Fifth Circuit again found that *in personam* jurisdiction existed although no party filed an *in personam* claim. *United States v. An Article of Drugs Containing 4,680 Pails*, 725 F.2d 976 (5th Cir. 1984). This case is more analogous to the traditional problem. Destruction of *in rem* jurisdiction by the owner of the res. Upon judgment for the defendant drug's manufacturer, the United States Marshal released the drug to the manufacturer. The United States did not file a motion for stay of execution, but did file a motion for a new trial. The manufacturer moved to dismiss for lack of *in rem* jurisdiction following the removal of the drug from the district.

In determining this issue, the Fifth Circuit first

looked to the *in rem* jurisdiction that the argument for dismissal rested upon; the need for the presence of the vessel or other res within the territorial confines of the court as a prerequisite to a court's jurisdiction. *Id.* This rule is predicated upon the admiralty fiction of convenience that a ship is a person, allowing actions to be brought against the res when the owner can not be reached. *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 22-23 (1960). The Fifth Circuit has dispensed with the strict application of this *in rem* rule when:

> "A legal fiction which exists solely to effectuate the adjudication of disputes is invoked for the opposite purpose, and we have found a substitute basis of *in personam* jurisdiction." *U.S. v. An Art. of Drug Con. of 4,680 Pails*, 725 F.2d at 928.

It is important to note that in reaching the determination in *An Article of Drugs*, the violation of the automatic ten-day stay provision of Rule 62(a) of the Federal Rules of Civil Procedure, in other words, improper release of the res was not a factor.

The Eleventh Circuit has also distinguished this holding in *One Lear Jet.* The majority acknowledged that *An Article of Drugs* is factually indistinguishable from *One Lear Jet*, yet they declined to follow the Fifth Circuit

holding because "precedent in this Circuit does not support [their] holding." 836 F.2d at 1577.

The dissent by Judge Clark in *One Lear Jet* notes:

> "a strict construction of the limits of *in rem* actions might bar any appeal of an *in rem* action unless supported by continued *in rem* jurisdiction. This narrow view of our jurisdiction, however, is difficult to square with the modern view, now almost cliche, that *in personam* jurisdiction can be asserted whenever the defendant has those minimum contacts with the forum state that will satisfy traditional notions of fair play and substantial justice." *Id.* at 1581 *quoting Inland Credit Corp. v. M/T Bow Egret*, 552 F.2d 1148, 1152 (5th Cir. 1977).

Forfeiture actions are unique, in that they are the only proceedings where the government may confiscate private property on a mere showing of probable cause. For the courts to eliminate the right of appeal, the most important safeguard against abuse, is a drastic step.

II.

DISMISSAL OF THE APPEAL WAS IMPROPER WITHOUT CONSIDERING WHETHER THE RES HAD BEEN RELEASED ACCIDENTALLY, FRAUDULENTLY OR IMPROPERLY.

The classic exception to the admiralty rule in question is accidental, fraudulent or improper removal of res does not destroy *in rem* jurisdiction. *Steamer Rio Grande v. Otis*, 90 U.S. (23 WALL) 458 (1874).

The res herein was improperly released to the government. Once the motion to place the money in an interest-bearing account was made, the Court had a duty to act upon that motion by granting or denying it. Since the motion was clearly reasonable and to the benefit of all parties concerned, and given the government's acquiescence to the motion, the money should have been placed in an interest-bearing account. In that case, a substitute res, with bank deposit notations would clearly have created and presented a substitute res with a fungible currency. *United States v. $57,480.05 in U.S. Currency*, 722 F.2d 1457 (9th Cir. 1984).

Depositing of such money would also require additional safeguards by the trustee to the interest of appellant in this currency. This was not done. Petitioner

did not receive notice of the impending transfer of funds as he would have had the money been placed in a bank account in trust for his benefit. The trial court, knowing of the impending appeal, having chosen itself to act as a surrogate trustee, had a fiduciary duty to inform the appellant of the impending release of the forfeited funds. This situation is analogous to *An Article of Drugs* in that the Government did not receive notification of the release of the res to the owner and did not request a stay of judgment. However, the court did not need reach this question by making a finding of *in personam* jurisdiction. The petitioner contends, failure of notification constitutes improper release of the funds and thus, *in rem* jurisdiction in the Sixth Circuit Court of Appeals may be sustained under the doctrine addressed in the *Rio Grande* case.

CONCLUSION

For the reasons set forth, the split of authority with regard to the finding of *in personam* jurisdiction when the res has been removed from the district and the failure to consider the manner in which the res had been released before dismissing for lack of *in rem* jurisdiction, Petitioner respectfully requests this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

TRANSCRIPT OF THE DISTRICT COURT'S FINDING OF FACTS

MR. MAYS: Your Honor, yes, I would like to make one, is that I don't think it is unreasonable to understand why the person involved would put cash before a person and expect that would be a way to buy a piece of property as cheaply as possible. I don't think that is unreasonable, and I think that is a reasonable negotiating term, and I think you have to always view the person's actions in the context of their own environment and their methods of dealing. Above all I would say there is nothing in Mr. Townsend's history that hinders his credibility, nothing.

THE COURT: I am going to do some oral findings of fact and conclusions of law which will be my ruling in connection with this case.

The initial inquiry, as we have indicated previously, is whether or not the government has carried its burden of establishing probable cause. The Court has already indicated earlier that it believes probable cause has been established. In making this determination a number of things are important.

As the Court has already indicated, for this stage of the proceeding the hearsay evidence can be considered

in the form of Agent Holmes' affidavit, and also in the form of the statements of other law enforcement officers as to what Agent Holmes said to them. In this connection Mr. Townsend's statement that the money belonged to a cocaine dealer can be considered. That, of course, alone does not establish that—I mean the statement that it belonged to a cocaine dealer does not necessitate an inference that it was used in connection with or derived from a narcotics transaction. That is just one of a number of factors that can be considered, however, to establish probable cause.

Other evidence that supports probable cause is the—Mr. Townsend's statements to the agents that he was taking the money to a Holiday Inn where he would leave it to be picked up by someone else. The fact that this money, the money in question, was a very large amount of money, over $72,000.00; that it was all cash, that it was mixed denominations ranging from fives, tens, twenties, smaller numbers of fifties and one hundred bills; the fact that the money was being taken to Miami, a known source of drugs for this part of the country, known that money flows there to buy cocaine, and also that proceeds from sales flow back there; the fact that Mr. Townsend denied ownership of the money and offered no explanation, even by his own admission he froze when they asked him about drugs, would also have been something that could be considered in connection with the decision to seize the money.

Another factor, of course, is the arrest of Mr. Townsend's brother. That in and of itself, of course, would not support a finding of probable cause, and it may well not have anything whatever to do with what the reason that Mr. Townsend was at the airport, but the agents indicated that their information, which came from Mr. Townsend, was that his brother had been arrested at the airport a few days earlier in possession of a kilogram of cocaine, and that is one very minor factor that might be considered in establishing probable cause, although it certainly would not permit an inference of anything if we were in a trial situation, but certainly, I think it is just something that could factor into the whole probable cause situation where one is looking at all the circumstances in existence.

Turning then to the second area of inquiry, once the government has established probable cause, the claimant bears the burden of establishing by a preponderance of the evidence that the money was not derived from or intended to be used to facilitate a narcotics transaction. In this part of the inquiry the hearsay statements referred to previously by Agent Holmes cannot be considered by the Court and have not been considered by the Court.

Further, I don't think it will be appropriate in this part of the proceeding to draw any inferences whatever from the fact that Mr. Townsend's brother had been arrested, so that part of the proof has not been

considered by the Court in connection with this particular finding.

The Court, however, cannot find, based on the proof offered by Mr. Townsend, that he has carried his burden of proof on this issue. The explanation offered by Mr. Townsend here today for his possession of this money is simply not credible. First, it is contrary to what he told the law enforcement officers on the day that the money was seized. Of course, he told them that the money was not his. Now he says that the money was his, except part of it belonged to an individual named George Miller. Second, he says that the money was being taken by him to Miami to buy a house, possibly buy a house. He offers no witnesses to support this, although several possible witnesses were mentioned by him, including George Miller, the individual whom Mr. Townsend claims owned part of the money. The owner of the property in question, the girlfriend of Mr. Miller, who Mr. Townsend claimed had come with him a previous occasion to look at the property, none of those individuals have testified. No records concerning this proposed transaction have been offered.

This story just is not credible. Mr. Townsend is a businessman. It isn't credible. If he had wanted to pay cash for this property, this is not the way in which a business person would have done this transaction, and if he had been going to pay cash, I would submit he could have paid cash through wiring funds or whatever. It is

just incredible he would get on an airplane going to Miami with $72,000.00 in a bag.

Another point is that in terms of assessing Mr. Townsend's credibility, the fact that this explanation was never offered by him until today. The government's interrogatory to Mr. Townsend quite obviously called for an explanation of the reason that he had this money and what his plans were about it. He totally avoided answering that question in his interrogatory responses.

The income records failed to give any explanation whatever of how a twenty-six year old, almost twenty-seven year old man could have come into the possession of $72,000.00 in cash. There is just no credible explanation of how that money came into his possession.

The burden is a tough one for somebody like Mr. Townsend. This statute is meant to be a tough one. He has to show by a preponderance of the evidence that the money is not derived from or intended to be used to facilitate a narcotics transaction, and the statute has some other language, but that pretty much sums up what the effect of it is, and he has simply offered here no credible proof from which the Court could find anything with respect to this money, because his explanation is simply not credible.

The Court doesn't have to find that it was intended to be used. It is simply his burden to show that it was not

intended to be used or was not derived from, and he has not carried that burden in my judgment.

Anything further?

MR. MAYS: Not from the money, Your Honor.

THE COURT: Not from the money.

MR. ARVIN: Nothing further, Your Honor.

THE COURT: I'm not sure how the judgment ought to read. I guess the judgment is against the defendant money.

MR. ARVIN: That's correct, Your Honor. You could have language in there disposed of according to law is the key words.

THE COURT: Needs to say what?

MR. ARVIN: To be disposed of according to law.

THE COURT: Under the provisions of the applicable statute.

MR. ARVIN: Under the provisions.

THE COURT: Okay.

MR. MAYS: Thank you very much, Your Honor.

CERTIFICATE

I, JOE N. MOORE, Official Court Reporter, certify that the foregoing is a correct transcript from the record of proceedings in the above entitled matter.

JOE N. MOORE

Date: 7-15-88

APPENDIX B

ORDER OF JUDGMENT OF DISTRICT COURT

UNITED STATES DISTRICT COURT
Western District of Tennessee
Western Division

Judgment in a Civil Case

United States of America,
Plaintiff,

v.

Seventy-two Thousand, Nine Hundred Forty Dollars in United States Currency,
Defendant.

Case Number: 86-2811-G

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDER AND ADJUDGED that in accordance with the Oral Findings of Fact and Conclusions of Law rendered by the court at the conclusion of the trial on April 27, 1988, the court ruled that judgment be entered in favor of the United States and against the defendant, Seventy-two Thousand, Nine Hundred Forty Dollars in United States Currency.

The subject property is forfeited to the plaintiff United States and is to be disposed of in accordance with law.

Approved:

JULIA SMITH GIBBONS
United States District Judge

This document entered on docket sheet in compliance with Rule 58 and/or 79(1) FRCP on 4-29-88.

May 2, 1988 DONNA L. RUSSELL
Clerk

APPENDIX C

ORDER AMENDING FINDINGS OF FACT BY THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
For the Western District of Tennessee
Western Division

United States of America,
Plaintiff,
vs. No. 86-2811 GB
Seventy-two Thousand, Nine Hundred Forty Dollars in United States Currency,
Defendant.

ORDER AMENDING ORAL FINDINGS AND CONCLUSIONS

At the conclusion of the proof in this case on April 27, 1988, this court made oral findings of fact and conclusions of law. The court now amends those oral findings of fact and conclusions of law to include a finding inadvertently omitted by the court in its oral findings.

Claimant Terry Townsend contended that the court should not consider statements made by him to law enforcement officers because he was detained without having been advised of his Miranda rights and because of

the coercive nature of his detention. The proof indicated that claimant Terry Townsend was not placed under arrest and was specifically advised that he was free to go. He freely and without coercion gave consent for the search of his luggage. In view of Townsend's lack of credibility on other issues, the court finds that the testimony of airport police officer Reginald Drake about the substance of the conversation between Townsend and airport police was more credible than that of Townsend.

IT IS SO ORDERED.

JULIA SMITH GIBBONS
United States District Judge

April 28, 1988

APPENDIX D

ORDER OF AMENDED JUDGMENT OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
Western District of Tennessee
Western Division

Amended Judgment in a Civil Case

United States of America,
Plaintiff,

v.

Seventy-two Thousand, Nine Hundred Forty Dollars in United States Currency,
Defendant.

Case Number: 86-2811-G

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDER AND ADJUDGED that in accordance with the Order Amending Oral Findings and Conclusions entered on April 29, 1988, the court finds that the testimony of airport police officer Reginald Drake about the substance of the conversation between Townsend and airport police was more credible than that of Townsend.

Approved:

JULIA SMITH GIBBONS
United States District Judge

This document entered on docket sheet in compliance with Rule 58 and/or 79(1) FRCP on 5-9-88.

May 9, 1988 DONNA L. RUSSELL
Clerk

APPENDIX E

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
For the Western District of Tennessee

United States of America, Plaintiff
v. Civil Action No. 86-2811-GB
Seventy-two Thousand Nine Hundred and Forty Dollars in United States Currency,

NOTICE OF APPEAL

Notice is hereby given that Terry Townsend and Seventy-two Thousand Nine Hundred and Forty Dollars in United States currency, hereby appeal to the United States Court of Appeals for the Sixth Circuit from the

final judgment of the United States District Court for the Western District of Tennessee, Western Division, in a forfeiture action granting title and possession of the Seventy-two Thousand Nine Hundred Forty Dollars against the interest of Terry Townsend to plaintiff, the United States of America; said order being entered in this action on the 29th day of April, 1988.

RICHARD L. MAYS
MAYS AND CRUTCHER, P.A.
415 Main Street
Little Rock, AR 72201
(501) 372-6303

APPENDIX F

MOTION TO DISMISS FOR LACK OF JURISDICTION

No. 88-5804
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

Seventy-two Thousand Nine Hundred and Forty Dollars In United States Currency,
Defendant-Appellant,

Terry Townsend,
Appellant.

BEFORE: JONES and NORRIS, Circuit Judges; and CONTIE, Senior Circuit Judge.

Plaintiff/appellee moves to dismiss this appeal for lack of *in rem* jurisdiction. Claimant/appellant has not responded to the motion.

On May 9, 1988, the district court entered a judgment of forfeiture in favor of plaintiff pursuant to 21 U.S.C. § 881. Claimant/appellant timely appealed but did not seek a stay of execution of judgment. On June 1, 1988, the defendant property was deposited with the Federal Reserve Bank for application to the General

Treasury Account.

Because the property has been released from the control of the court, we lack jurisdiction over this appeal. *See U.S. v. $2,490.00 in U.S. Currency*, 825 F.2d 1419 (9th Cir. 1987); *U.S. v. One 1979 Rolls Royce Corniche*, 770 F.2d 713 (7th Cir. 1975). Accordingly, this appeal is dismissed.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN
Clerk

Mandate Issued: 02/22/89
Costs Taxed: None
A True Copy.
Attest: Leonard Green, Clerk

APPENDIX G

ORDER DENYING PETITION FOR REHEARING EN BANC

No. 88-5804
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America,
Plaintiff-Appellee
v. ORDER
Seventy-two Thousand Nine Hundred and Forty Dollars in United States Currency,
Defendant-Appellant,
Terry Townsend,
Appellant

BEFORE: JONES and NORRIS, Circuit Judges; and CONTIE, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for

rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN
Clerk

Transmission Form

District Court Caption: District Court No. 86-2811 GB
United States of America,
Plaintiff-Appellee
v.
Seventy-two Thousand, Nine Hundred Forty Dollars in U.S. Currency ($72,940 00)
Defendant-Appellant

Current Counsel for Plaintiff:
Mr. W. Hickman Ewing
U.S. Attorney
1026 Federal Office Bldg.
Memphis, TN 38103
901/521-4231

Current Counsel for Defendant:
Mr. Richard L. Mays
Attorney at Law
415 Main St.

Little Rock, AR 72201
501/372-6303

District Court Filing Fee Paid —
Court of Appeals Docket Fee Paid
District Court Judge Julia Smith Gibbons
Court Reporter Joe N. Moore
Any hearing or trial? Yes. If yes, dates: 2-11-87, 1-21-88, 4-27-88

I hereby certify that I have transmitted to the United States Court of Appeals for the Sixth Circuit the annexed documents consisting of 01 volume(s) of pleadings, 01 volume(s) of transcript and 0 volume(s) of depositions, which constitute the CERTIFIED RECORD ON APPEAL, this 8th day of August, 1988.
***Also included, one (1) vol. exhibits

Clerk, Linda Booker
United States District Court

Plaintiffs: United States of America

Defendants: Seventy-two Thousand, Nine Hundred Forty Dollars in U.S. Currency
[Terry A. Townsend]

Complaint for forfeiture pursuant to Title 21, U.S.C. §881.

Attorneys:

Mr. W. Hickman Ewing
U.S. Attorney
1026 Federal Office Bldg.
Memphis, Tn. 38103
By: Timothy R. DiScenza, AUSA

Mr. Richard L. Mays, Attorney
415 Main St.
Little Rock, AR 72201
501/372-6303

APPENDIX H

Forfeitures:

21 U.S.C. Section 881

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(b) All moneys, negotiable instruments, securities or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter,

except that no property shall be forfeited under this paragraph, to the extent of the interest of the owner by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

APPENDIX I

Search and Seizure:

(e) MOTIONS FOR RETURN OF PROPERTY. A person aggrieved by an lawful search and seizure may move the District Court for the District in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The Judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the District of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

No. 88-1850

Supreme Court, U.S.
FILED
JUL 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

SEVENTY-TWO THOUSAND NINE HUNDRED AND FORTY DOLLARS IN UNITED STATES CURRENCY AND TERRY TOWNSEND, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
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QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction over petitioner's appeal from a judgment of forfeiture because the forfeited property was no longer under the control of the court.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1850

SEVENTY-TWO THOUSAND NINE HUNDRED AND FORTY DOLLARS IN UNITED STATES CURRENCY AND TERRY TOWNSEND, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. F36-F37) is unpublished, but the decision is noted at 860 F.2d 1080 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 25, 1988. A petition for rehearing was denied on February 10, 1989. Pet. App. G38-G39. The petition for a writ of certiorari was filed on April 11, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 13, 1986, petitioner Townsend carried $72,940.00 in currency in a bag as he passed through a security checkpoint in the Memphis International Airport.

Tr. 16, 73, 81-82. Townsend was on his way to Miami, Florida. *Id.* at 17. The currency was detected when the bag passed through an X-ray machine. *Id.* at 42-43. Law enforcement agents then approached Townsend, talked with him, and seized the $72,940.00, suspecting that the money was related to drug transactions. *Id.* at 13-15, 35.

Townsend filed a motion under Fed. R. Crim. P. 41(e) for the return of the money. On October 15, 1986, however, the government filed this civil forfeiture action against the property under 21 U.S.C. 881. Townsend answered the forfeiture complaint and filed motions to exclude the evidence and to place the money in an interest-bearing account. Pet. 9-10.

Following a bench trial in the United States District Court for the Western District of Tennessee, the district court entered a judgment of forfeiture in favor of the government and against the currency. The judgment, which was entered on May 2, 1988, stated: "The subject property is forfeited to the plaintiff United States and is to be disposed of in accordance with law." Pet. App. B30. Townsend filed a notice of appeal from the judgment of forfeiture, but he did not move to stay the district court's judgment. On June 1, 1988, the U.S. Marshal for the Western District of Tennessee transferred the $72,940.00 from the custody of the Marshal to the Federal Reserve Bank for deposit into the General Treasury Account. See Declaration of Aug. 26, 1988, attached to Gov't C.A. Motion to Dismiss for Lack of Jurisdiction.

2. On October 5, 1988, the government moved to dismiss Townsend's appeal for lack of jurisdiction. On October 25, 1988, the court of appeals granted the government's motion. The court stated: "Because the property has been released from the control of the court, we lack jurisdiction over this appeal." Pet. App. F36-F37.

ARGUMENT

Petitioners contend (Pet. 12-22) that the court of appeals erred in dismissing his appeal for lack of jurisdiction. That contention is without merit.

1. It is well settled that civil forfeiture proceedings are in rem actions. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974). A court's jurisdiction over a forfeiture action depends upon the court's control over the property. See *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984); *United States* v. *United States Coin & Currency*, 401 U.S. 715, 719-720 (1971); *Pennington* v. *Fourth National Bank*, 243 U.S. 269, 272 (1917). For that reason, the courts of appeals consistently dismiss appeals where a judgment of forfeiture was entered and the prevailing party lawfully executed the judgment, thereby by taking the property from the court's control. In order to preserve the res pending appeal, a claimant must seek a stay of execution on the judgment, file a supersedeas bond, or otherwise ensure that the judgment will not be enforced and the res removed from the control of the court. See *United States* v. *One Lear Jet Aircraft, Ser. No. 35A-280*, 836 F.2d 1571, 1573 (11th Cir.) (en banc), cert. denied, 108 S. Ct. 2844 (1988); *United States* v. *$2,490.00 in U.S. Currency*, 825 F.2d 1419, 1420-1421 (9th Cir. 1987); *United States* v. *$79,000 in United States Currency*, 801 F.2d 738, 739-740 (5th Cir. 1986); *United States* v. *One 1979 Rolls-Royce Corniche Convertible*, 770 F.2d 713, 716-717 (7th Cir. 1975).

Here, the district court ordered the $72,940.00 forfeited to the government. Petitioner failed to seek or obtain a stay of that judgment. The money was then transferred from the control of the district court to the United States Treasury. Hence, the court of appeals correctly held that

the district court, and consequently the appellate court, no longer had jurisdiction over this action.

2. Petitioner Townsend does not seriously dispute that the transfer of the property from the control of the district court destroyed in rem jurisdiction. See Pet. 13. Townsend contends (*id.* at 13-14), however, that the court of appeals continued to have personal jurisdiction over the government and him. Townsend bases his claim on the fact that, prior to the filing of the forfeiture action, he filed a Fed. R. Crim. P. 41(e) motion for the return of seized property. Townsend's contention is not persuasive.

The judgment from which petitioners appealed (see Pet. App. 34-35) was the final judgment in the civil forfeiture action brought under 21 U.S.C. 881. It was that judgment that resulted in the forfeiture of the $72,940.00, and it was that judgment that petitioners needed to stay in order to ensure that the property would remain within the jurisdiction of the court. Petitioner Townsend's separate motion for return of the property played no role in this forfeiture action and it was not subsumed in the judgment of forfeiture. Thus, Townsend's separate Rule 41(e) motion did not give the court of appeals an independent basis of jurisdiction over the appeal in the forfeiture case.

3. Contrary to Townsend's contention (Pet. 15-19), the judgment below does not conflict with the decisions of other courts of appeals. In *United States* v. *Wingfield*, 822 F.2d 1466 (10th Cir. 1987), cert. dismissed, 108 S. Ct. 1762 (1988), the district court possessed property that was claimed both by the Internal Revenue Service and the County of Boulder, Colorado. The district court ordered the property given to the IRS, and the County appealed. The Tenth Circuit held that it had jurisdiction over the County's appeal even though the property had already been given to the government. The court reasoned that it had in personam jurisdiction over the government and

could, under Section 7426(b) of the Internal Revenue Code (26 U.S.C.), order the government to pay a money judgment equal in value to the subject property. See 822 F.2d at 1471-1472. Here, there was no analogous legal ground in the appeal before the Sixth Circuit on which the court of appeals could have relied to order the government to pay $72,940.00 to petitioner Townsend if the court had determined that the judgment of forfeiture was improper.*

Townsend relies primarily (Pet. 15-17) on three cases from the Fifth Circuit. Those cases, however, are clearly distinguishable. In *Inland Credit Corp.* v. *M/T Bow Egret*, 552 F.2d 1148 (5th Cir. 1977), the court of appeals asserted jurisdiction because the plaintiff mortgagee brought its action both in rem against a ship and in personam against the ship's owner, and because the ship's mortgagee, seeking to recapture a part of another creditor's recovery, had also appealed. In *Treasure Salvors, Inc.* v. *Unidentified Wrecked and Abandoned Sailing Vessel,* 569 F.2d 330 (5th Cir. 1978), the court held that it had jurisdiction over the government's appeal despite the absence of the res because the government intervened, stipulated to in personam jurisdiction, and filed a counterclaim that had a jurisdictional basis independent from the res. And in *United States* v. *An Article of Drugs Consisting of 4,680 Pails*, 725 F.2d 976, 984 (5th Cir. 1984), the court of appeals heard an appeal in a case brought under the Food, Drug, and Cosmetic Act even though the subject property was beyond the court's control because "[t]he substantive character of the remedy

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* Petitioners' reliance on *Trans-Asiatic Oil Ltd., S.A.* v. *Apex Oil Co.*, 804 F.2d 773 (1st Cir. 1986), is also misplaced. The court of appeals there held that it had jurisdiction over a case despite the fact that the property in issue had been released, because the prevailing party had earlier waived any jurisdictional objection.

sought in this case [was] not forfeiture." In the context of a true in rem forfeiture action such as this—where a judgment was not entered against Townsend but against the property—the Fifth Circuit has joined the other circuits in holding that the court's loss of control over the res destroys jurisdiction. See *United States* v. *$79,000 in United States Currency*, 801 F.2d 738 (5th Cir. 1986) (appeal dismissed in forfeiture action where $79,000 was paid to the U.S. Customs Service after the claimant did not obtain a stay of the judgment).

4. Lastly, petitioner Townsend contends (Pet. 20-21) that the court of appeals erred in dismissing his appeal without considering whether the $72,940.00 was released accidentally, fraudulently, or improperly. There is no basis for petitioner's claim that the transfer of funds was improper. The money was transferred to the United States Treasury after the government obtained a judgment in its favor from the district court and petitioner failed to obtain a stay pending appeal. The release of the money was therefore entirely proper. See *United States* v. *One Lear Jet Aircraft, Ser. No. 35A-280,* 836 F.2d at 1574 n.2.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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THOMAS E. BOOTH
Attorney

JULY 1989

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